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MISSOURI APPROVED JURY INSTRUCTIONS [MAI]

October 2022 Pocket Part

Prepared by the
MISSOURI SUPREME COURT COMMITTEE
ON
CIVIL JURY INSTRUCTIONS

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PREFACE

This pocket part to *Missouri Approved Jury Instructions (MAI)* updates the Eighth Edition with new and revised jury instructions and cases received through September 15, 2022.

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2.00

EXPLANATORY

2.01 Instruction for All Cases

2.01 [2022 Revision] Instruction for All Cases

(Approved February 8, 2022; Effective July 1, 2022)

(1) GENERAL—JURY INSTRUCTIONS

This instruction and other instructions that I will read to you near the end of the trial are in writing. All of the written instructions will be handed to you for guidance in your deliberation when you retire to the jury room. They will direct you concerning the legal rights and duties of the parties and how the law applies to the facts that you will be called upon to decide.

(2) OPENING STATEMENTS

The trial may begin with opening statements by the lawyers as to the evidence that they expect to present during the trial. What is said in opening statements is not to be considered as proof of a fact. However, if a lawyer admits some fact on behalf of a client, the other party is relieved of the responsibility of proving that fact.

(3) EVIDENCE

After the opening statements, the plaintiff(s) will introduce evidence.[1] The defendant(s) may then introduce evidence. There may be rebuttal evidence after that. The evidence may include the testimony of witnesses who may appear personally in court, the testimony of witnesses who may not appear personally but whose testimony may be read or shown to you and exhibits, such as pictures, documents and other objects. Testimony of witnesses shown to you by video may contain pauses or "glitches" due to editing or to conform to rulings of the court.

(4) OBJECTIONS

There may be some questions asked or evidence offered by the parties to which objections may be made. If I overrule an objection, you may consider that evidence when you

deliberate on the case. If I sustain an objection, then that matter and any matter I order to be stricken is excluded as evidence and must not be considered by you in your deliberations.

(5) RULINGS OF LAW AND BENCH CONFERENCES

While the trial is in progress, I may be called upon to determine questions of law and to decide whether certain matters may be considered by you under the law. No ruling or remark that I make at any time during the trial will be intended or should be considered by you to indicate my opinion as to the facts. There may be times when the lawyers come up to talk to me out of your hearing. This will be done in order to permit me to decide questions of law. These conversations will be out of your hearing to prevent issues of law, which I must decide, from becoming mixed with issues of fact, which you must decide. We will not be trying to keep secrets from you.

(6) OPEN MINDS AND NO PRELIMINARY DISCUSSIONS

Justice requires that you keep an open mind about the case until the parties have had the opportunity to present their cases to you. You must not make up your mind about the case until all evidence, and the closing arguments of the parties, have been presented to you. You must not comment on or discuss with anyone, not even among yourselves, what you hear or learn in trial until the case is concluded and then only when all of you are present in the jury room for deliberation of the case under the final instructions I give to you.

(7) OUTSIDE INFLUENCES

During the trial you should not remain in the presence of anyone who is discussing the case when the court is not in session. Otherwise, some outside influence or comment might influence a juror to make up his or her mind prematurely and be the cause of a possible injustice. For this rea-

son, the lawyers and their clients are not permitted to talk with you until the trial is completed.

(8) PROHIBITION OF JUROR RESEARCH OR COMMUNICATION ABOUT THIS CASE

Your deliberations and verdict(s) must be based only on the evidence and information presented to you in the proceedings in this courtroom. Rules of evidence and procedure have developed over many years to make sure that all parties in all cases are treated fairly and in the same way and to make sure that all jurors make a decision in this case based only on evidence allowed under those rules and which you hear or see in this courtroom. It would be unfair to the parties to have any juror influenced by information that has not been allowed into evidence in accordance with those rules of evidence and procedure, or to have a juror influenced through the opinion of someone who has not been sworn as a juror in this case and heard evidence properly presented here.

Therefore, I instruct you that you may not conduct your own research or investigation into any issues in this case. You must not visit the scene of any of the incidents described in this case. You must not conduct any independent research or obtain any information of any type by talking to any person, referring to textbooks, dictionaries, magazines, blogs, the Internet, or any other means about any issues in this case, or any witnesses, parties, lawyers, medical or scientific terms, or evidence that is in any way involved in this trial. You are not permitted to communicate, use a cell phone, record, photograph, video, e-mail, blog, tweet, text, or post anything about this trial or your thoughts or opinions about any issue in this case to any other person or to the Internet, "Facebook," "Myspace," "Twitter," "Snapchat," "Instagram," or any other personal or public website or any other social media platform during the course of this trial or at any time before my acceptance of your verdict at the end of the case.

If any of you break these rules, this will be a serious

breach of your oath as a juror. It could result in a miscarriage of justice, and we may have to start the trial all over.

(9) FINAL INSTRUCTIONS

After all of the evidence has been presented, you will receive my final instructions. They will guide your deliberations on the issues of fact you are to decide in arriving at your verdict.

(10) CLOSING ARGUMENTS

After you have received my final instructions, the lawyers may make closing arguments. In closing arguments, the lawyers have the opportunity to direct your attention to the significance of evidence and to suggest the conclusions that may be drawn from the evidence.

(11) DELIBERATIONS

You will then retire to the jury room for your deliberations. It will be your duty to select a foreperson, to decide the facts and to arrive at a verdict. When you enter into your deliberations, you will be considering the testimony of witnesses as well as other evidence. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to any of the parties, the inclination of the witness to speak truthfully or untruthfully and the probability or improbability of the witness's statements. You may give any evidence or the testimony of any witness such weight and value as you believe that evidence or testimony is entitled to receive.

[Optional Paragraphs (12) and (13): See Committee Comments D & E]

[(12) NOTETAKING

[Each of you may take notes in this case, but you are not required to do so. I will give you notebooks. Any notes

you take must be in those notebooks only. You may not take any notes out of the courtroom before the case is submitted to you for your deliberations. No one will read your notes while you are out of the courtroom. If you choose to take notes, do not allow your notetaking to interfere with your ability to observe the evidence and witnesses as they are presented.

Do not discuss or share your notes with anyone until you begin your deliberations. During the deliberations, if you choose to do so, you may use your notes and discuss them with other jurors. Notes taken during trial are not evidence. You should not assume that your notes, or those of other jurors, are more accurate than your own recollection or the recollection of other jurors.

After you reach your verdict your notes will be collected and destroyed. No one will be allowed to read them.][2]

[(13) JUROR QUESTIONS

[After all parties have completed questioning each witness, any juror may anonymously submit written questions to me for my review. You may not ask questions orally or out loud. I may limit the number of questions or revise the form of any question. You must not draw any adverse inference against any party if I decide not to allow one or more of your questions for legal reasons. If I decide to allow any of your questions, I will read them to the witness and allow the witness to answer. I may then allow follow-up questions of that witness by the attorneys.][3]

Notes on Use (2008 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 43.)

Committee Comment (2014 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 44.)

6.00

DAMAGES—WRONGFUL DEATH—MITIGATING AND AGGRAVATING CIRCUMSTANCES

6.02 Aggravating Circumstances

6.02 [1998 Revision] Aggravating Circumstances

(No change to Instruction. See Main Volume, p. 117.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510. 261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. See *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo.banc 1995).

C. Where issues of "harm to others" arise in the context of aggravating circumstances in a wrongful death case, the requirements of the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007), will be implicated. See the bracketed paragraph and accompanying Note on Use 1 to MAI 10.02 for appropriate modification of an instruction submitting "damages for aggravating circumstances" in such cases.

9.00

EMINENT DOMAIN

General Notice

GENERAL NOTICE

In 2017, the burden of proof to be used in all eminent domain cases, MAI 9.03, was revised. The 2017 revised version of the eminent domain burden of proof instruction should be used in Illustrations 9.06 (Instruction No. 4) and 9.07 (Instruction No. 4). For each Illustration, MAI 9.03, the burden of proof instruction, should read as follows:

The burden is on the defendant to cause you to believe that defendant has sustained damage and the amount thereof. In determining the amount of your verdict, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

Research References

West's Key Number Digest
Damages ⚭215(1)

A.L.R. Library
West's A.L.R. Digest, Damages ⚭215(1)

Legal Encyclopedias
Am. Jur. 2d, Damages §§ 584, 617 to 619
C.J.S., Damages §§ 238, 239

10.00

DAMAGES—EXEMPLARY

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10.06 Both Negligence and Strict Liability Submitted
10.07 Modification of MAI 10.02—Submission of Specific Acts and Knowledge

10.00 [2022 Revision] General Comment

(Approved November 23, 2021; Effective July 1, 2022)

The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 or § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067, RSMo, on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

10.01 [2008 Revision] Outrageous Conduct—Intentional Torts

(No change to Instruction. See Main Volume, p. 144.)

Notes on Use (2008 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 144.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. In *Burnett v. Griffith*, 769 S.W.2d 780 (Mo.banc 1989), the court adopted this instruction for the submission of punitive damages in intentional tort cases and held that the definition of "legal malice" in MAI 16.01 should no longer be used.

C. See MAI 4.15 and 4.16 for submission of punitive damages in libel and slander cases.

D. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

E. Existing MAI 10.01 fits some cases but does not fit the drunken driving case.

10.02 [2008 Revision] Negligence Constituting Conscious Disregard for Others

(No change to Instruction. See Main Volume, p. 149.)

Notes on Use (2008 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 149.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510. 261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. Existing MAI 10.01 fits some cases but does not fit the drunken driver case.

C. In *Nichols v. Bresnahan*, 357 Mo. 1126, 1130–31, 212 S.W.2d 570, 573 (1948), the court cited with approval Restatement of Torts § 500 (1935), as follows:

> The actor's (defendant's) conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.

D. The court approved an instruction requiring a finding that defendant's conduct exhibited "a conscious disregard and indifference to the . . . consequences." Id.

E. In *Evans v. Illinois Central Railroad Co.*, 289 Mo. 493, 233 S.W. 397, 400 (Mo.banc 1921), the court said:

> A wanton act is a wrongful act done on purpose, or in malicious disregard of the rights of others. Recklessness is an indiffer-

ence to the rights of others and an indifference whether wrong or injury is done or not. As we understand the words "conscious disregard of the life and bodily safety," they add nothing to the words "willful, wanton and reckless," and are included within the meaning of those words. As applied to an act, they necessarily mean that such act was intentionally done without regard to the rights of others, and in full realization of the probable results thereof.

F. See also *Stojkovic v. Weller*, 802 S.W.2d 152, 155 (Mo.banc 1991), overruled on other grounds by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 108 (Mo.banc 1996), regarding the submissibility of punitive damages in a case involving an intoxicated driver. (Evidence of driver's intoxication, leaving scene of accident, and erratic driving would have supported submission of issue of punitive damages to jury.)

G. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

10.03 [1983 Revision] Multiple Defendants

(No change to Instruction. See Main Volume, p. 153.)

Committee Comment (2022 New)

(Approved November 23, 2021; Effective July 1, 2022)

A. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

10.04 [2008 Revision] Strict Liability—Either Product Defect or Failure to Warn Submitted

(No change to Instruction. See Main Volume, p. 154.)

Notes on Use (2008 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 154.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510. 261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. It was held in *Racer v. Utterman*, 629 S.W.2d 387 (Mo.App. E.D. 1981), that MAI 10.02 is inappropriate for submission of punitive damages in a case wherein compensatory damages are awarded against a strict liability defendant but that:

> If plaintiff, in addition to proving the conduct necessary to support the strict liability claim, can also establish a degree of fault in such conduct sufficient to justify punitive damages, those damages may also be recovered. *Id.* at 396.

C. MAI 10.04 is drafted to submit the issue of punitive damages under the evidence detailed in the *Racer* opinion. If the substantive law and evidence support a submission on a theory other than actual knowledge of the product defect, then there should be an appropriate modification of paragraph First.

D. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

10.05 [2008 Revision] Strict Liability—Both Product Defect and Failure to Warn Submitted

(No change to Instruction. See Main Volume, p. 157.)

Notes on Use (2008 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 157.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

10.06 [2008 Revision] Both Negligence and Strict Liability Submitted

(No change to Instruction. See Main Volume, p. 159.)

Notes on Use (2008 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 160.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

10.07 [2008 Revision] Modification of MAI 10.02—Submission of Specific Acts and Knowledge

(No change to Instruction. See Main Volume, p. 161.)

Notes on Use (2008 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 161.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

17.00

VERDICT DIRECTING—MOTOR VEHICLES

17.17 Per se Negligence—Improper Turn
17.18 Per se Negligence—Violating Speed Limit

17.17 [1978 Revision] Per se Negligence—Improper Turn

(No change to Instruction. See Main Volume, p. 307.)

Notes on Use (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

MAI 17.17 is based on the model traffic ordinance Section 300.215, RSMo (assuming it is adopted by local ordinance). Although the violation of a traffic statute or ordinance may be negligence per se (*Rowe v. Kansas City Pub. Serv. Co.*, 248 S.W.2d 445, 448 (Mo.App. 1952)), "[u]nder the circumstances of a particular case there may be a valid excuse for failing to comply with a statutory rule of the road, as where nonobservance of the statute is induced by considerations of safety . . . or where compliance is impossible . . ." *MacArthur v. Gendron*, 312 S.W.2d 146, 150 (Mo.App. 1958).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit comparative fault.

An affirmative converse instruction should not be used to submit in the affirmative the same issue as has already been submitted in the verdict directing instruction. See *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970); *Oliver v. Bi-State Dev. Agency*, 494 S.W.2d 49 (Mo. 1973). Use a true converse instruction to converse an element that is submitted by the verdict director.

Caution: Where an affirmative converse instruction is properly submitted, the verdict director must be modified by adding a phrase, commonly referred to as an "affirmative defense" tail, that refers the jury directly from the verdict director to the affirmative converse instruction. No such "tail" is required when a true converse instruction is submitted. See the discussion in MAI 33.01. In *Goudeaux v. Board of Police Commissioners*, 409 S.W.3d 508 (Mo.App. W.D. 2013), the court held that the facts constituting a legal justification or excuse must be pleaded as an affirmative defense and that such a submission does not preclude the submission of negligence per se. Cf. *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Committee Comment (2012 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 308.)

17.18 [1978 Revision] Per se Negligence—Violating Speed Limit

(No change to Instruction. See Main Volume, p. 309.)

Notes on Use (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

MAI 17.18 is based on Section 304.010, RSMo. Violation of other statutes or ordinances may be submitted as negligence per se using MAI 17.18. Although the violation of a traffic statute or ordinance may be negligence per se (*Rowe v. Kansas City Pub. Serv. Co.*, 248 S.W.2d 445, 448 (Mo.App. 1952)), "[u]nder the circumstances of a particular case there may be a valid excuse for failing to comply with a statutory rule of the road, as where nonobservance of the statute is induced by considerations of safety . . . or where compliance is impossible . . ." *MacArthur v. Gendron*, 312 S.W.2d 146, 150 (Mo.App. 1958).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit comparative fault.

An affirmative converse instruction should not be used to submit in the affirmative the same issue as has already been submitted in the verdict directing instruction. See *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970); *Oliver v. Bi-State Dev. Agency*, 494 S.W.2d 49 (Mo. 1973). Use a true converse instruction to converse an element that is submitted by the verdict director.

Caution: Where an affirmative converse instruction is properly submitted, the verdict director must be modified by adding a phrase, commonly referred to as an "affirmative defense" tail, that refers the jury directly from the verdict director to the affirmative converse instruction. No such "tail" is required when a true converse instruction is submitted. See the discussion in MAI 33.01. In *Goudeaux v. Board of Police Commissioners*, 409 S.W.3d 508 (Mo.App. W.D. 2013), the court held that the facts constituting a legal justification or excuse must be pleaded as an affirmative defense and that such a submission does not preclude the submission of negligence per se. Cf. *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Committee Comment (2012 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 310.)

24.00

FEDERAL EMPLOYERS' LIABILITY ACT

24.01(A)	Verdict Directing—Constructive Knowledge Not In Issue—Failure to Provide Safe Place to Work
24.01(B)	Verdict Directing—Constructive Knowledge Disputed—Failure to Provide Safe Place to Work
24.04(B)	Affirmative Defense—Contributory Negligence
24.06	Damages—Death of Employee
24.07	Damages—Injury to Employee

24.01(A) [2021 Revision] Verdict Directing—Constructive Knowledge Not In Issue—Failure to Provide Safe Place to Work

(Approved March 2, 2021; Effective July 1, 2021)

Your verdict must be for plaintiff[1] if you believe:

First, plaintiff was an employee of defendant,[2] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[3] and

Third,[4] defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe [appliances],[5] or

reasonably safe methods of work, or

reasonably adequate help, and[6]

Fourth, defendant in any one or more of the respects submitted in Paragraph Third was negligent,[7,8] and

Fifth, such negligence[7] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[9]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number *(here insert number of affirmative defense instruction)*].

Notes on Use (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

1. In a case where defendant is submitting plaintiff's contributory negligence, the initial phrase of plaintiff's verdict director should be modified as follows:

> In your verdict, you must assess a percentage of fault to defendant [whether or not plaintiff was partly at fault],[1] if you believe:

[1] The bracketed phrase may be used at plaintiff's option.

2. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

3. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

4. The specifications of negligence set forth in this instruction concern conditions of which the defendant had constructive knowledge. See MAI 24.01(B) for cases in which constructive knowledge is disputed.

5. The term "equipment" or any other statutory term used in 45 U.S.C.A. § 51 may be substituted for the word "appliances."

6. In the event that the negligence charged is based upon the acts of the defendant's employee, the following alternate paragraphs Third and Fourth must be used.

"Third, defendant's employee *(characterize the negligent conduct, i.e., failed to keep a careful lookout, etc.)*, and"

"Fourth, defendant's employee was thereby negligent, and"

7. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

8. In the event that there is only a single submission of negligence under paragraph Third, then paragraph Fourth must be modified to read as follows:

"Fourth, defendant was thereby negligent, and"

9. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence or failure to mitigate damages in an FELA case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 446.)

24.01(B) [2021 Revision] Verdict Directing—Constructive Knowledge Disputed—Failure to Provide Safe Place to Work

(Approved March 2, 2021; Effective July 1, 2021)

Your verdict must be for plaintiff[1] if you believe:

First, plaintiff was an employee of defendant,[2] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[3] and

Third,[4] conditions for work were not reasonably safe and defendant knew or by using ordinary care[5] could have known of such conditions and that they were not reasonably safe, and

Fourth, with respect to such conditions for work, defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe [appliances],[6] or

reasonably safe methods of work, or

reasonably adequate help, and

Fifth, defendant in any one or more of the respects submitted in Paragraph Fourth was negligent,[5] and[7]

Sixth, such negligence[5] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[8]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ (here insert number of affirmative defense instruction)].

Notes on Use (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

1. In a case where defendant is submitting plaintiff's contributory

negligence, the initial phrase of plaintiff's verdict director should be modified as follows:

> In your verdict, you must assess a percentage of fault to defendant [whether or not plaintiff was partly at fault],[1] if you believe:
>
> [1] The bracketed phrase may be used at plaintiff's option.

2. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

3. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

4. MAI 24.01(B) is to be used in cases in which constructive knowledge of the railroad is disputed. *Qualls v. St. Louis SW Ry. Co.*, 799 S.W.2d 84 (Mo. banc 1990), *cert. denied* 499 U.S. 961, 111 S.Ct. 1585, 113 L.Ed.2d 650 (1991). This instruction should not be used "if the judge decides the plaintiff has shown defendant had actual knowledge of the negligently produced condition." *Qualls*, 799 S.W.2d at 87.

5. The terms "negligent" and "negligence" must be defined. The term "ordinary care" must be defined. See definitions in Chapter 11.00.

6. The term "equipment" or any other statutory term used in 45 U.S.C.A. § 51 may be substituted for the word "appliances."

7. In the event that there is only a single submission of negligence under paragraph Fourth, then paragraph Fifth must be modified to read as follows:

"Fifth, defendant was thereby negligent, and"

8. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence or failure to mitigate damages in an FELA case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 449.)

24.04(B) [2021 Revision] Affirmative Defense—Contributory Negligence

(Approved March 2, 2021; Effective July 1, 2021)

In your verdict, you must assess a percentage of fault to plaintiff [whether or not defendant was partly at fault][1] if you believe:

First, plaintiff *(characterize the act of negligence, such as "failed to keep a lookout for oncoming trains")*, and

Second, plaintiff was thereby negligent,[2] and[3]

Third, such negligence[2] of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

1. The bracketed phrase may be used at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

3. If more than one specification of negligence is submitted, modify Paragraph First to submit such specifications in the disjunctive and modify Paragraph Second to read:

"Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and"

4. Select the appropriate phrase.

If contributory negligence is submitted, see MAI 24.06 and 24.07 for appropriate modification of the damage instruction in an FELA case. Use Verdict Form 37.07.

Committee Comment (2016 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 457.)

24.06 [2021 Revision] Damages—Death of Employee

(Approved March 2, 2021; Effective July 1, 2021)

If you find in favor of the plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate *(here identify the beneficiaries)* for any damages you believe (he, she, they) [and decedent][1] sustained [and *(here identify the beneficiaries)* are reasonably certain to sustain in the future][2] as a direct result of the fatal injury to *(name of decedent)*. Any award of future pecuniary damages must be included at present value. [Any award you may make is not subject to income tax.][3] [In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to decedent. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you attribute to decedent.][4]

You must not consider grief or bereavement suffered by reason of the death.

Notes On Use (1996 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 460.)

Committee Comment (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

A. This instruction is used only in FELA cases wherein the employee was fatally injured. The reference to present value is used in FELA cases in compliance with *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). *Dickerson* clearly requires inclusion of the sentence relating to present value if requested. It is not clear under *Dickerson* whether it is error to omit the present value sentence if inclusion is not requested.

B. The submission of comparative fault in an FELA case is now consistent with the method in Chapter 37.00 for use in cases based on Missouri law. FELA cases are governed by federal law. Under Chapter 37.00, the *jury* determines total damages and plaintiff's percentage of fault but the *judge* makes the actual computation diminishing *total damages* to the amount recoverable by plaintiff. This is consistent with the submission of comparative fault in FELA cases in other jurisdictions.

C. 45 U.S.C.A. Section 53 states that "the jury" is to determine the damages "in proportion to the amount of negligence attributable to such employee. . . ." The statutory provision does not specify how the jury is to make that determination. The United States Supreme Court has held that the jury can make its determination by writing down percentages of fault for both parties and separately recording the amount of total damages. *Norfolk & Western Ry. Co., v. Ayers*, 538 U.S. 135 (2003) at 144 n.6; 570–71 (where the Court sanctioned the use of verdict forms which required the jury to write down percentages of fault and the amount of total damages in an FELA asbestosis claim).

D. During the instruction conference, the parties and the court should discuss, on the record, what damages are supported by the evidence and can properly be argued to the jury. In FELA wrongful death cases, recovery is limited to pecuniary losses. See *American Railroad Co. of Porto Rico v. Didricksen*, 227 U.S. 145 (1913); *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In this way, jury arguments can proceed without undue interruptions.

24.07 [2021 Revision] Damages—Injury to Employee

(Approved March 2, 2021; Effective July 1, 2021)

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] as a result of the occurrence[2] mentioned in the evidence. [In determining plaintiff's damages, you may include an amount to compensate plaintiff for the fear of cancer if you believe that such fear is genuine and serious.][3] Any award of future pecuniary damages must be included at present value. [Any award you make is not subject to income tax.][4] [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number____, in determining plaintiff's total damages you must not include those damages that would not have occurred without such failure.][5] [In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.][6]

Notes on Use (2010 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 462.)

Committee Comment (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

A. The reference to present value is used in FELA cases in compliance with *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). *Dickerson* clearly requires inclusion of the sentence relating to present value if requested. It is not clear under *Dickerson* whether it is error to omit the present value sentence if inclusion is not requested.

B. The submission of comparative fault in an FELA case is now consistent with the method in Chapter 37.00 for use in cases based on Missouri law. FELA cases are governed by federal law. Under Chapter 37.00, the *jury* determines total damages and plaintiff's percentage of

fault but the *judge* makes the actual computation diminishing *total damages* to the amount recoverable by plaintiff. This is consistent with the submission of comparative fault in FELA cases in other jurisdictions.

C. 45 U.S.C.A. Section 53 states that "the jury" is to determine the damages "in proportion to the amount of negligence attributable to such employee. . . ." The statutory provision does not specify how the jury is to make that determination. The United States Supreme Court has held that the jury can make its determination by writing down percentages of fault for both parties and separately recording the amount of total damages. *Norfolk & Western Ry. Co., v. Ayers*, 538 U.S. 135 (2003) at 144 n.6; 570–71 (where the Court sanctioned the use of verdict forms which required the jury to write down percentages of fault and the amount of total damages in an FELA asbestosis claim).

D. This instruction is used only in FELA cases where the employee sustained injury. Other than the references to taxation, present value, and mitigation of damages, it is essentially the same as MAI 4.01 with the exception that the word "direct" is deleted from the fifth line of MAI 4.01. This is required in an FELA case so that the instruction complies with the substantive law set forth in *Wilmoth v. Chicago, Rock Island & P.R. Co.*, 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 89 S.Ct. 1706, 23 L.Ed.2d 176 (1969); and *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

31.00

VERDICT DIRECTING—MISCELLANEOUS

31.16 Waiver of Sovereign Immunity—Dangerous Condition of Public Entity's Property—Actual or Constructive Notice
31.17 Waiver of Sovereign Immunity—Dangerous Condition of Public Entity's Property Created by Employee

31.16 [2023 Revision] Waiver of Sovereign Immunity—Dangerous Condition of Public Entity's Property—Actual or Constructive Notice

(Approved August 30, 2022; Effective July 1, 2023)

Your verdict must be for plaintiff if you believe[1]:

First, defendant *(here identify the public entity)* owned *(describe the property, such as "sidewalk", "manhole", "drainage ditch")*,[2] and

Second, *(here describe condition that made the public entity's property dangerous, such as "there was oil on the gymnasium floor" or "the table saw was unguarded")*, and as a result the defendant's *(describe property, such as "gymnasium floor" or "table saw")* was not reasonably safe, and

Third, defendant knew or by using ordinary care[3] could have known of this condition in time to [either] [remedy such condition] [warn of such condition] [make the condition reasonably safe][4], and

Fourth, defendant failed to use ordinary care[3] to [either] [remedy such condition] [warn of such condition] [make the condition reasonably safe][4], and

Fifth, as a direct result of such failure, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2023 Revision)

(Approved August 30, 2022; Effective July 1, 2023)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01. For submission of plaintiff's comparative fault for failure to keep a careful lookout, see MAI 32.28.

2. If ownership is not in dispute, omit Paragraph First, then renumber the other paragraphs of the verdict directing instruction. When the public entity does not own the property, it must have "exclusive possession and control" over it. *Allen v. 32nd Judicial Circuit*, 638 S.W.3d 880 (Mo. banc 2022). If there is a factual dispute about the control of the property, substitute the following for Paragraph First: "First, defendant (*identify the public entity*) had exclusive possession and control of the (*describe the property, such as "sidewalk", "manhole", "drainage ditch"*), and...". See *Walton v. City of Seneca*, 420 S.W.3d 640 (Mo. App. 2013); *Spielvogel v. City of Kansas City*, 302 S.W.3d 108 (Mo. App. 2009); *Thomas v. Clay County Election Board*, 261 S.W.3d 574 (Mo. App. 2008). Compare, *Randel v. City of Kansas City*, 467 S.W.3d 383 (Mo. App. 2015).

3. The phrase "ordinary care" must be defined. See definition at MAI 11.05.

4. If more than one phrase is used, they must be submitted in the disjunctive and each must be supported by the evidence. Other submissions of negligence, such as "barricade it", "remove it", or another appropriate submission, may also be proper if supported by the facts of the case.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. *See* MAI 37.01.

Committee Comment (2021 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 571.)

31.17 [2023 Revision] Waiver of Sovereign Immunity—Dangerous Condition of Public Entity's Property Created by Employee

(Approved August 30, 2022; Effective July 1, 2023)

Your verdict must be for plaintiff if you believe[1]:

First, defendant *(here identify the public entity)* owned *(describe the property, such as "sidewalk", "manhole", "drainage ditch")*,[2] and

Second, *(here describe condition that made the public entity's property dangerous, such as "there was oil on the gymnasium floor" or "the table saw was unguarded")*, and as a result the defendant's *(describe property, such as "gymnasium floor" or "table saw")* was not reasonably safe, and

Third, such condition was created by an employee of *(name of public entity)* within the scope and course of employment[3], and

Fourth, the employee was thereby negligent[4], and

Fifth, as a direct result of such negligence, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2023 Revision)

(Approved August 30, 2022; Effective July 1, 2023)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01. For submission of plaintiff's comparative fault for failure to keep a careful lookout, see MAI 32.28.

2. If ownership is not in dispute, omit Paragraph First, then renumber the other paragraphs of the verdict directing instruction. When the public entity does not own the property, it must have "exclusive possession and control" over it. *Allen v. 32nd Judicial Circuit*,

638 S.W.3d 880 (Mo. banc 2022). If there is a factual dispute about the control of the property, substitute the following for Paragraph First: "First, defendant (*identify the public entity*) had exclusive possession and control of the (*describe the property, such as "sidewalk", "manhole", "drainage ditch"*), and...". See *Walton v. City of Seneca*, 420 S.W.3d 640 (Mo. App. 2013); *Spielvogel v. City of Kansas City*, 302 S.W.3d 108 (Mo. App. 2009); *Thomas v. Clay County Election Board*, 261 S.W.3d 574 (Mo. App. 2008). Compare, *Randel v. City of Kansas City*, 467 S.W.3d 383 (Mo. App. 2015).

3. Delete the phrase "within the scope and course of employment" if not in issue. If in issue, the phrase must be defined. See Chapter 13.00 and particularly MAI 13.05, which will fit the facts of most cases.

4. IThe terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. *See* MAI 37.01.

Committee Comment (1993 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 574.)

33.00

CONVERSE INSTRUCTIONS

33.16 Conversing Exemplary Damages

33.16 [1991 New] Conversing Exemplary Damages

(No change to Instruction. See Main Volume, p. 670.)

Notes on Use (1991 New)

(Unchanged—See text of Notes on Use, Main Volume, p. 671.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

B. Exemplary or punitive damages instructions at MAI 10.01, 10.02, 10.04, 10.05, 10.06, and 10.07 contain bracketed sentences to be added if necessary to comply with the requirement of the United States Supreme Court decision in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007). These bracketed sentences complying with *Williams* should *not* be conversed. The proper method of conversing an exemplary damages instruction from Chapter 10 is as demonstrated in the MAI 33.16.

35.00

ILLUSTRATIONS

General Notice
35.00 General Comment
35.19 Punitive Damages—Bifurcated Trial Under § 510.263—No Comparative Fault—Two Defendants—Apportionment of Fault Between Defendants

GENERAL NOTICE

In 2016, the general burden of proof instruction (MAI 3.01) was revised. The 2016 revised version of the burden of proof instruction should be used in Illustrations 35.02 (Instruction No. 5), 35.03 (Instruction No. 5), 35.04 (Instruction No. 5), 35.05 (Instruction No. 6), 35.07 (Instruction No. 4), 35.10 (Instruction No. 5), 35.14 (Instruction 5), 35.15 (Instruction No. 5), 35.16 (Instruction No. 5), 35.17 (Instruction No. 5), 35.18 (Instruction No. 5), 35.19 (Instruction No. 5), 35.20 (Instruction No. 4), 35.21 (Instruction No. 5), and 35.22 (Instruction No. 5). For each illustration, MAI 3.01, the burden of proof instruction, should read as follows:

> Your verdict will depend on the facts you believe after considering all the evidence. The party who relies upon any disputed fact has the burden to cause you to believe that such fact is more likely true than not true. In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

Research References

West's Key Number Digest

Automobiles ⇐246(22), 246(38.5); Contracts ⇐294; Damages ⇐216(1); Eminent Domain ⇐222(5); Negligence ⇐1746; Products Liability ⇐423; Wills ⇐333

A.L.R. Library

A.L.R. Index, Collisions; Eminent Domain; Instructions to Jury; Products Liability; Wills

West's A.L.R. Digest, Automobiles ⇐246(22), 246(38.5); Contracts ⇐294; Damages ⇐216(1); Eminent Domain ⇐222(5); Negligence ⇐1720, 1746; Products Liability ⇐423; Wills ⇐333

35.00 [2022 Revision] General Comment

(Approved November 23, 2021; Effective July 1, 2022)

1. The Committee furnishes for your use illustrations prepared by the Committee in certain hypothetical cases using court-approved instructions. If any conflict exists between an instruction and an illustration, the court-approved instruction governs. *Northeast Mo. Elec. Power Co-op. v. Fulkerson*, 542 S.W.2d 26 (Mo.App. 1976); *State ex rel. State Highway Com'n v. Schwartz*, 526 S.W.2d 952 (Mo.App. 1975).

2. In referring to the illustrations, care should be used to be certain that the illustration and its instructions apply to the facts and legal theory of the case being submitted and that none of the instructions used in the illustration has been revised by the Committee. (Always check the most recent pocket part.)

3. In the illustrations in this edition of MAI, factual situations may differ from those used in illustrations in prior editions of MAI. The annotations to the prior illustrations will vary in applicability depending on the extent to which the former factual situation was carried over into the present illustration.

4. The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except: (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo, (repealed by H.B. 393) and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 and § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally (§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5 RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

5. MAI 2.04 instructs a jury that nine or more jurors must agree in

order to return any verdict. See article I, sec. 22(a) of the Missouri Constitution and § 494.490, RSMo.

In *dicta*, the Supreme Court stated that the same nine jurors must agree on all elements necessary for a verdict for or against any particular party. *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911, 924 (Mo.banc 1992), abrogated on other grounds, *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo.banc 2008). See also, *State ex rel. Boyer v Perigo*, 979 S.W.2d 953, 956 (Mo.App. S.D. 1998).

The general rule is not applicable where the jury is required to return more than one verdict. Where there are multiple packages, each with a separate verdict form, a different group of nine jurors can agree to all of the elements of each verdict. *Mackey v. Smith*, 438 S.W.3d 465, 474 (Mo.App. W.D. 2014); *Kemp v. Burlington Northern R. Co.*, 930 S.W.2d 10, 12 (Mo.App. E.D. 1996). Nine jurors may agree to liability and damages, but a different nine may apportion fault among the defendants. *Powell v. Norman Lines, Inc.*, 674 S.W.2d 191, 199 (Mo.App. E.D. 1984). A different nine also may assess the amount of punitive damages in the second stage of trial under Illustration 35.19 in a bifurcated trial after nine jurors agree on liability, amount of compensatory damages, and liability for punitive damages in the first stage of trial. *Ellison v. O'Reilly Automotive Stores, Inc.*, 463 S.W.3d 426, 439 (Mo.App. W.D. 2015). Jurors who disagree with the remaining jurors on the resolution of one package (verdict) may not be prohibited by jury instructions from deliberating on another package (verdict). To do so would deny the parties the right to a jury of twelve persons deliberating on all issues. *Ellison*, 463 S.W.3d at 440; *Mackey*, 438 S.W.3d at 474; *Powell*, 674 S.W.2d at 199.

See Illustrations 35.02, 35.03, 35.04, 35.05, 35.15, and 35.19 for examples of cases in which packaging is employed to submit multiple claims. On each verdict form within those Illustrations, a different nine may return any verdict in accordance with MAI 2.04.

35.19 [2021 Revision] Punitive Damages—Bifurcated Trial Under § 510.263—No Comparative Fault—Two Defendants—Apportionment of Fault Between Defendants

(No change to Instruction. See Main Volume, p. 784.)

Notes on Use (1992 New)

(Unchanged—See text of Notes on Use, Main Volume, p. 793.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo.banc 1990), the amount of punitive damages assessed against a defendant is *not* to be reduced by any percentage of fault assessed to plaintiff in a comparative fault case.

B. Caution: The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in §§ 510.265 and 537.067, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

C. Caution: Section 538.210.5, RSMo, provides that punitive damages may be assessed against a health care provider in actions accruing after February 3, 1986, only where the health care provider demonstrated willful, wanton, or malicious misconduct. The Committee takes no position on the constitutionality of Senate Bill 663, 1986 Mo. Laws 879.

D. The Committee takes no position on the constitutionality of House Bill 700, 84th General Assembly, 1st Regular Session (1987), of which § 510.263, RSMo, was a part, and which was perpetuated in House Bill 393 of the 93rd General Assembly (2005) with limitations on punitive damages in certain cases.

E. Caution: S.B. 591 (Laws 2020) purports to effect changes to the law of punitive damages for cases filed after the effective date thereof (as opposed to the accrual date) in the following areas: (1) generally

(§ 510.261.1, RSMo), (2) related to master servant, principal agent (§ 510.261.3, RSMo), (3) pleadings and discovery (§ 510.261.5, RSMo), (4) but retains prior common law and statutory law unless expressly inconsistent (§ 510.261.8, RSMo), and (5) additional, distinct changes for punitive damages in medical malpractice cases (§ 538.210.8, RSMo). Case law will determine the extent of those changes and the impact on jury instructions. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

F. The trial judge should exercise sound discretion in affording attorneys appropriate leeway during the various stages of trial to describe to the jury the proceedings contemplated by § 510.263, RSMo.

G. After the first stage of trial, there may be additional evidence in the second stage relating to the net worth of the defendants found liable for punitive damages. There may also be additional argument by counsel as to the amount (possibly "zero") to be assessed by the jury as punitive damages. The Committee takes no position as to whether additional evidence, other than net worth, may be admissible in the second stage of trial.

H. The method in this Illustration of splitting MAI 10.04 and modifying its component parts for submission of punitive damages in a bifurcated trial pursuant to § 510.263 may be utilized with any punitive damage instruction in Chapter 10.

I. The word "assess" is used in Instruction Number 18 rather than the phrase "award plaintiff" because the award of punitive damages may not inure entirely to the benefit of the plaintiff. § 537.675, RSMo, provides a mechanism for the State of Missouri to obtain one-half of any final judgment awarding punitive damages. The Committee takes no position on the constitutionality of § 537.675 or whether the potential interest of the State of Missouri and the "Tort Victims Compensation Fund" created by § 537.675.1 may be argued to the jury.

37.00

COMPARATIVE FAULT

37.00 Comparative Fault—General Comment
37.01 Verdict Directing Modification
37.03 Damages

37.00 [2022 Revision] Comparative Fault—General Comment

(Approved November 23, 2021; Effective July 1, 2022)

A. Missouri has adopted pure comparative fault as set forth in the Uniform Comparative Fault Act, 12 U.L.A. 135 (1996), "insofar as possible." *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.banc 1983). The Uniform Comparable Fault Act may be a bit difficult to locate, but it is attached as an Appendix to the *Gustafson* decision. A thorough analysis of comparative fault is not possible within the limitations of this General Comment. However, a few observations on the interrelationship of comparative fault with instructional issues are appropriate.

B. The adoption of pure comparative fault in Missouri does not mean that comparative fault will be submitted in all cases. The doctrine does not eliminate or reduce the defendant's burden of pleading and proving a prima facie case of fault on the part of the plaintiff. The doctrine only eliminates that aspect of contributory negligence that would operate to bar a plaintiff's recovery. Rather, such negligence on the part of the plaintiff, if supported by law and fact, translates that conduct into a reduction of plaintiff's recovery in proportion to the percentage of fault assessed to plaintiff.

C. An instruction submitting comparative fault of the plaintiff must be supported by substantial evidence, and by the law, or it will be erroneous. *Herrington v. Medevac Med. Response*, 438 S.W.3d 417 (Mo.App. W.D. 2014); *Roy v. Mo. Pac. R.R. Co.*, 43 S.W.3d 351 (Mo.App. W.D. 2001); *Brown v. Shawneetown Feed & Seed Co.*, 730 S.W.2d 587 (Mo.App. E.D. 1987).

D. In a premises case, there must also be evidence that the plaintiff had actual (or constructive) knowledge and appreciation of the danger actually encountered, that the plaintiff could have seen the danger, and that the plaintiff could have taken precautionary action to avoid the danger. *Rider v. YMCA of Greater Kansas City*, 460 S.W.3d 378 (Mo.App. W.D. 2015); *Brown*, supra; *Burns v. Schnuck Mkts., Inc.*, 719 S.W.2d 499 (Mo.App. E.D. 1986).

E. Under some circumstances, the doctrine of assumption of the risk (implied primary assumption of the risk) is a question of law for the court. On the other hand, "implied secondary assumption of the risk" would ordinarily be submitted as a "failure to keep a careful lookout." See *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184 (Mo.banc 2014).

F. If there is evidence from which a jury could conclude that a plaintiff's negligence was legally sufficient, and a contributing cause to

the plaintiff's own damages, the case may be submitted to the jury under approved comparative fault instructions in the format provided in Chapter 37. A comparative fault instruction must be tendered by either the defendant, or the plaintiff, if the case is to be submitted under comparative fault. However, the submission of comparative fault is not the exclusive province of the defendant. See *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 810 (Mo.App. W.D. 2008); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo.App. W.D. 2006). In the *Brown & Williamson Tobacco Corp.* cases, the court noted that allowing a defendant to withdraw consideration of comparative fault after introduction of evidence of the plaintiff's fault would negate the concept of comparative fault and effectively reinstate the concept of contributory negligence as an absolute bar to recovery.

G. If neither side tenders a comparative fault instruction, the case may be submitted on the basis of the existence or nonexistence of defendant's fault. *Henderson v. Terminal R.R. Ass'n of St. Louis*, 736 S.W.2d 594 (Mo.App. E.D. 1987); *Earll v. Consol. Aluminum Corp.*, 714 S.W.2d 932 (Mo.App. E.D. 1986).

H. Comparative fault has been applied legislatively to the doctrine of strict liability in tort for a product defect. See § 537.765, RSMo; *Egelhoff v. Holt*, 875 S.W.2d 543, 547 (Mo.banc 1994). Any instruction that simply quotes statutory language from § 537.765 for a submission of comparative fault may be erroneous as not complying with Rule 70.02(b) requirements that all instructions are to be simple, brief, impartial, and neither submit, nor require findings of, detailed evidentiary matters. The subparagraphs of § 537.765 are necessarily general and do not specify any act of the plaintiff on which to base a finding of comparative negligence and may implicate judicial prohibitions against roving commissions.

I. Comparative fault has also been applied to other forms of statutory strict liability. See *Coble v. Taylor*, 480 S.W.3d 467 (Mo.App. S.D. 2016) (strict liability claim under the Animal Enclosure Act, § 272.030, RSMo).

J. In a case involving multiple defendants, the defendants are permitted only one, jointly submitted comparative fault instruction related to the plaintiff's fault; it would be error to give two or more. *Egelhoff*, 875 S.W.2d 543; *Cornell v. Texaco, Inc.*, 712 S.W.2d 680 (Mo.banc 1986). It is important to note that a defendant may rely on multiple submissions of plaintiff's fault—submitted in the alternative in a single instruction—even though inconsistent. *Michael v. Kowalski*, 813 S.W.2d 6 (Mo.App. W.D. 1991).

K. The doctrine of comparative fault is concerned only with the relative fault among the parties. It does not contemplate an inquiry into

all causative agents for an injury. Therefore, the 100% figure determined by the jury is related only to the combined fault of the parties. There may be other causative agents—e.g., immune parties, settling tortfeasors, persons not joined, etc.—that may be considered to be partly at fault, but these are not part of the determination of all or any part of the fault assessed by the jury. *Freight House Lofts Ass'n v. VSI Meter Servs.*, 402 S.W.3d 586 (Mo.App. W.D. 2013). The Comment to § 2 of the Uniform Comparative Fault Act, 12 ULA 135, 136 (1996), requires that the conduct or fault of non-parties be ignored. Thus, the verdict form should not contain a space for the assessment of fault to a nonparty or settling tortfeasor. *Fahy v. Dresser Indus., Inc.*, 740 S.W.2d 635 (Mo.banc 1987). Likewise, a verdict form may not allow an assessment of a percentage of fault to a party on an unpleaded theory. *Bradley v. Waste Mgmt. of Mo., Inc.*, 810 S.W.2d 525 (Mo.App. E.D. 1991).

L. Under *Gustafson*, the doctrine of joint and several liability was not affected by the adoption of pure comparative fault as contained in the Uniform Comparative Fault Act. However, in 2005, the Missouri legislature revised § 537.067, RSMo, and changed responsibility for damage awards depending on the parties' percentages of fault. That revised statute now provides that any party found to be less than 51% responsible is only liable for that percentage of a damage award. Any party responsible for 51% fault or more can be made to pay the entire amount of an award. § 537.067.1.

M. When a case involves a primary injury to one spouse, and a consortium claim on behalf of the other spouse, the same percentage of fault assessed to the primary claim also applies to the consortium claim. See *Johnson v. Hyster Co.*, 777 S.W.2d 281 (Mo.App. W.D. 1989); MAI (Civil) 37.08 and 37.09.

N. General principles applicable to verdict-directing instructions also apply to comparative fault cases. A party has a right to try or defend a case based on that party's own theory as long as the verdict-directing instruction submitting that party's theories is supported by the law, the evidence, and in proper form. *Mitchell v. Evans*, 284 S.W.3d 591 (Mo.App. W.D. 2008); *Coleman v. Meritt*, 292 S.W.3d 339 (Mo.App. S.D. 2009). Neither an opposing party, nor the trial court itself, has the right to interfere with a party's selection of an appropriate submission of recovery or defense.

O. As a general proposition, the appellate courts may remand for new trial on all issues because of an erroneous comparative fault instruction—the issues of fault and damages are generally considered to be blended and interwoven. *Secrist v. Treadstone, LLC*, 356 S.W.3d 276 (Mo.App. W.D. 2011); *Talley v. Swift Transp. Co.*, 320 S.W.3d 752 (Mo.App. W.D. 2010).

P. The Supreme Court of Missouri also held that the doctrine of

pure comparative fault applied to a claim of purely economic loss. *Children's Wish Found. Int'l, Inc. v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648 (Mo.banc 2011).

Q. Under § 537.765, RSMo, the defendant in a products liability action may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery. Under Subsection 3 of the statute, "fault" is limited to: (1) the failure to use the product as reasonably anticipated by the manufacturer; (2) use of the product for a purpose not intended by the manufacturer; (3) use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger; (4) unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable exposure to said danger; (5) the failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances. See Committee Comment S regarding mitigation of damages under § 537.765.3(6), RSMo.

R. The enumerated items in Section 537.765.3(1) to (5) provide a conceptual basis for submission of comparative fault in a product liability claim. However, these concepts do not lend themselves to a literal insertion in a comparative fault instruction. The specific facts of each case must be analyzed and incorporated consistent with MAI, utilizing the MAI format to submit ultimate facts and not evidentiary detail. See, e.g., MAI 37.02 and *Hoeft v. Louisville Ladder Co.*, 904 S.W.2d 298 (Mo.App. W.D. 1995); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo.App. W.D. 2006); *Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422 (Mo.App. W.D. 1994); and *Schaedler v. Rockwell Graphic Sys., Inc.*, 817 S.W.2d 499 (Mo.App. W.D. 1991). See Committee Comment S regarding mitigation of damages under § 537. 765.3(6), RSMo.

S. Subparagraph (6) of § 537.765.3, RSMo, provides that "(6) The failure to mitigate damages" is included in the statute as one of the limitations on "fault" in a strict liability products case. See § 537.760, RSMo. The Committee believes that "failure to mitigate damages" is conceptually different from the types of "fault" of the plaintiff enumerated in § 537.765.3(1) to (5), RSMo, and that the legislative intent is best effectuated by submitting "failure to mitigate damages" in accordance with the method provided in MAI 32.29, and the bracketed phrase associated with Note 4 of the Notes on Use to MAI 4.01. For a comparative fault case in which "failure to mitigate damages" is also an issue, MAI 32.29 would be used to submit that issue, and the above bracketed phrase from 4.01 would be inserted at the end of the first paragraph of

MAI 37.03. Under this method, the jury is instructed not to include in total damages any amount of damages caused by plaintiff's failure to mitigate. See the discussion of "mitigation of damages" in Committee Comments D and E to MAI 4.01.

37.01 [1986 New] Verdict Directing Modification

(No change to Instruction. See Main Volume, p. 886.)

Notes on Use (2012 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 886.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. This modification of traditional verdict directing instructions is for use in submitting comparative fault as adopted in *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.banc 1983). The optional bracketed phrase in the opening sentence is intended to alleviate any doubt the jury may have about returning a verdict for plaintiff in a situation where plaintiff is partly at fault. For submission of a true affirmative defense in a comparative fault case, see MAI 37.06.

B. Under § 537.765, RSMo, the defendant in a products liability action may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery. Under Subsection 3 of the statute, "fault" is limited to: (1) the failure to use the product as reasonably anticipated by the manufacturer; (2) use of the product for a purpose not intended by the manufacturer; (3) use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger; (4) unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable exposure to said danger; (5) the failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances. See Committee Comment D regarding mitigation of damages under § 537.765.3(6), RSMo.

C. The enumerated items in Section 537.765.3(1)–(5) provide a conceptual basis for submission of comparative fault in a product liability claim. However, these concepts do not lend themselves to a literal insertion in a comparative fault instruction. The specific facts of each case must be analyzed and incorporated consistent with MAI, utilizing the MAI format to submit ultimate facts and not evidentiary detail. See, e.g., MAI 37.02 and *Hoeft v. Louisville Ladder Co.*, 904 S.W.2d 298 (Mo.App. W.D. 1995); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo.App. W.D. 2006); *Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422 (Mo.App. W.D. 1994); and *Schaedler v.*

Rockwell Graphic Sys., Inc., 817 S.W.2d 499 (Mo.App. W.D. 1991). See Committee Comment D regarding mitigation of damages under § 537.765.3(6), RSMo.

D. Subparagraph (6) of § 537.765.3, RSMo, provides that "(6) The failure to mitigate damages" is included in the statute as one of the limitations on "fault" in a strict liability products case. See § 537.760, RSMo. The Committee believes that "failure to mitigate damages" is conceptually different from the types of "fault" of the plaintiff enumerated in § 537.765.3(1) to (5), RSMo, and that the legislative intent is best effectuated by submitting "failure to mitigate damages" in accordance with the method provided in MAI 32.29, and the bracketed phrase associated with Note 4 of the Notes on Use to MAI 4.01. For a comparative fault case in which "failure to mitigate damages" is also an issue, MAI 32.29 would be used to submit that issue, and the above bracketed phrase from 4.01 would be inserted at the end of the first paragraph of MAI 37.03. Under this method, the jury is instructed not to include in total damages any amount of damages caused by plaintiff's failure to mitigate. See the discussion of "mitigation of damages" in Committee Comments D and E to MAI 4.01.

37.03 [1986 New] Damages

(No change to Instruction. See Main Volume, p. 893.)

Notes on Use (2002 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 893.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. When appropriate, other damage instructions such as those applicable to wrongful death, etc., may be modified in the format of this instruction to submit comparative fault.

B. Under § 537.765, RSMo, the defendant in a products liability action may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery. Under Subsection 3 of the statute, "fault" is limited to: (1) the failure to use the product as reasonably anticipated by the manufacturer; (2) use of the product for a purpose not intended by the manufacturer; (3) use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger; (4) unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable exposure to said danger; (5) the failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances. See Committee Comment D regarding mitigation of damages under § 537.765.3(6), RSMo.

C. The enumerated items in Section 537.765.3(1)–(5) provide a conceptual basis for submission of comparative fault in a product liability claim. However, these concepts do not lend themselves to a literal insertion in a comparative fault instruction. The specific facts of each case must be analyzed and incorporated consistent with MAI, utilizing the MAI format to submit ultimate facts and not evidentiary detail. See, e.g., MAI 37.02 and *Hoeft v. Louisville Ladder Co.*, 904 S.W.2d 298 (Mo.App. W.D. 1995); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo.App. W.D. 2006); *Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422 (Mo.App. W.D. 1994); and *Schaedler v. Rockwell Graphic Sys., Inc.*, 817 S.W.2d 499 (Mo.App. W.D. 1991). See Committee Comment D regarding mitigation of damages under § 537.765.3(6), RSMo.

D. Subparagraph (6) of § 537.765.3, RSMo, provides that "(6) The

failure to mitigate damages" is included in the statute as one of the limitations on "fault" in a strict liability products case. See § 537.760, RSMo. The Committee believes that "failure to mitigate damages" is conceptually different from the types of "fault" of the plaintiff enumerated in § 537.765.3(1) to (5), RSMo, and that the legislative intent is best effectuated by submitting "failure to mitigate damages" in accordance with the method provided in MAI 32.29, and the bracketed phrase associated with Note 4 of the Notes on Use to MAI 4.01. For a comparative fault case in which "failure to mitigate damages" is also an issue, MAI 32.29 would be used to submit that issue, and the above bracketed phrase from 4.01 would be inserted at the end of the first paragraph of MAI 37.03. Under this method, the jury is instructed not to include in total damages any amount of damages caused by plaintiff's failure to mitigate. See the discussion of "mitigation of damages" in Committee Comments D and E to MAI 4.01.

38.00

EMPLOYMENT DISCRIMINATION

38.00	General Comment
38.01(A)	Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing before August 28, 2017)
38.01(B)	Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing before August 28, 2017)
38.02	Missouri Human Rights Act—Lawful Justification (for actions accruing before August 28, 2017)
38.03	Verdict Directing—Wrongful Discharge in Violation of Public Policy
38.06	Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing on or after August 28, 2017)
38.07	Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing on or after August 28, 2017)
38.08	Missouri Human Rights Act—Business Judgment Rule (for actions accruing on or after August 28, 2017)
38.09	Missouri Human Rights Act—Damages (for actions accruing on or after August 28, 2017)
38.10	Missouri Human Rights Act—Verdict Form (for actions accruing on or after August 28, 2017)

38.00 [2023 New] General Comment

(Approved June 28, 2022; Effective January 1, 2023)

A. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form). See S.B. 43 (2017), § 213.101.6, RSMo (2017), 99th General Assembly, which states it "hereby abrogates all Missouri-approved jury instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017."

B. S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

C. MAI 38.03 [2012 Revision] (verdict directing—wrongful discharge in violation of public policy), applies to both non-public and public employees for common law causes of action for wrongful termination in violation of public policy and common law causes of action to protect whistleblowers from retaliation. See *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010) and *Kunzie v. City of Olivette*, 184 S.W.3d 570, 574–75 (Mo. banc 2006).

D. For a statutory whistleblower cause of action for non-public employees, S.B. 43 enacted the "Whistleblowers Protection Act," effective August 28, 2017. Section 285.575.3, RSMo, provides: "This section is intended to codify the existing common law exceptions to the at-will employment doctrine and to limit their future expansion by the courts. This section, in addition to chapter 213 and chapter 287, shall provide the exclusive remedy for any and all claims of unlawful employment

practices." The Act seems to explicitly recognize and codify the common law for wrongful discharge in violation of public policy and further seems to explicitly recognize the remedy provided for retaliatory discharge in a Workers Compensation setting under § 287.780, RSMo.

E. Under § 285.575, RSMo (2017), (the Whistleblower's Protection Act), the person's status as a protected person must be the motivating factor for any adverse decision or outcome. The term "motivating factor" is defined in § 285.575.2(5) as "the employee's protected classification actually played a role in the adverse decision or action and had a determinative influence on the adverse decision or action." See, MAI 38.05, MAI 38.06, and MAI 38.07 for the language used when submitting the concept of "motivating factor."

F. Under § 285.575.7(3), RSMo (2017), (the Whistleblower's Protection Act), an employee must show by "clear and convincing evidence" that the "conduct of the employer was outrageous because of the employer's evil motive or reckless indifference to the rights of others" in order to be awarded double damages. The statute does not heighten the burden of proof for causation or other damages.

G. According to § 285.575.2(2), the Whistleblower's Protection Act does not apply to "the state of Missouri or its agencies, instrumentalities, or political subdivisions, including but not limited to any public institution of higher education, a corporation wholly owned by the state of Missouri, an individual employed by an employer, or corporations and associations owned or operated by religious or sectarian organizations[.]" See § 285.575.2(2), RSMo (2017).

H. For actions accruing before August 28, 2018, statutory whistleblowing claims by public employees could be brought under § 105.055, RSMo, *et seq.*, as amended in 2010 by H.B. 1868. Under § 105.055.7(3), RSMo (2010), "A public employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf has reported or was about to report, verbally or in writing, a prohibited activity or a suspected prohibited activity." The clear and convincing standard applies to only one element of the cause of action. Section 105.055, RSMo (2010), did not adopt or incorporate a "motivating factor" standard or any standard. In 2010, *Fleshner v Pepose Vision Institute, P.C.* 304 S.W.3d 81, 94–95 (Mo. banc 2010), the Court approved the "contributing factor" standard for causation in wrongful discharge in violation of public policy cases.

I. In 2018, in S.B. 1007, the General Assembly amended the statutory cause of action, Public Employee Whistleblower Statute, § 105.055, RSMo. That statute defines public employee, § 105.055.1(2), RSMo, and public employer, § 105.055.1(3), RSMo. Section 105.055, RSMo (2018), did not adopt or incorporate the "motivating factor" standard or any

standard. However, in *Fleshner v Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 94–95 (Mo. banc 2010), the Court approved the "contributing factor" standard for causation in wrongful discharge in violation of public policy cases.

J. Under § 105.055.7(3), RSMo (2018), "A public employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf has reported or was about to report, verbally or in writing, a prohibited activity or a suspected prohibited activity." The clear and convincing standard applies to only one element of the cause of action. Once such conduct is established, "the burden shall be on the public employer to demonstrate that the disciplinary action was not the result of such a report." See § 105.055.7(3), RSMo (2018).

K. Section 105.055.3(1), RSMo (2018), requires at a minimum that the employee reasonably believes that the employer's activity is prohibited, e.g., a violation of any law, rule, regulation or policy; mismanagement; or other acts listed in the statute.

L. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides a cause of action for unlawful retaliation, stating it is unlawful discriminatory practice to "retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter[.]" *McCrainey v. Kansas City Missouri Sch. Dist.*, 337 S.W.3d 746, 754 (Mo.App. 2011), held that a "plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim[,]" and concluded "that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice." *Id.* at 753. The Committee takes no position on whether "a good faith, reasonable belief" is a submissibility issue for the judge or a jury question.

38.01(A) [2018 Revision] Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing before August 28, 2017)

(No change to Instruction. See Main Volume, p. 916.)

Notes on Use (2014 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 916.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

> 1. It shall be an unlawful employment practice:
>
> (1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:
>
> (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;
>
> . . .

B. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides in part:

> 1. It shall be an unlawful discriminatory practice for an employer, employment agency, labor organization, or place of public accommodation:
>
> . . .
>
> (1) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter;
>
> . . .

In *McCrainey v. Kansas City Missouri School Dist.*, 337 S.W.3d 746, 754 (Mo.App. 2011), the Court held that a "plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim." Additionally, the court concluded "that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice." *Id.* at 753. The Committee takes no position on whether "a good faith, reasonable belief" modification to the verdict director is appropriate or required.

C. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo.banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo.

D. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo.banc 2006).

E. In *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo.banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2. Do not use this instruction for a disability discrimination claim where the issue of disability is disputed. Where plaintiff's disability is disputed, use MAI 38.01(B).

F. In *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. 2012), the court questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

G. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. 2012), addressed the issue of causation in a Missouri Human Rights Act claim in view of the trial court's attempt to provide the jury with a curative instruction based upon a "but for" argument in closing. In reversing the trial court, the court in *Thomas* stated:

> The trial court's wording of the but for issue— "but for . . . their age . . ., they would not have been terminated" —effectively told the jury that it would not be enough for Appellants to prove that their age was an actual contributing cause of their discharge. Under the law, Appellants could prevail if

the jury believed that age was a "contributing factor" in their discharge; this oral instruction said they could prevail only if the jury believed that their age was ***the*** cause, in and of itself, of their discharge. 388 S.W.3d at 216.

The court acknowledged that terms such as "but for causation" are not to be used when instructing the jury as it creates the potential for confusion. It is generally error for a trial court to attempt to instruct the jury on "but for causation." But see, S.B. 43 (2017) and Historical Note, below.

H. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. 2014). But see, S.B. 43 (2017) and Historical Note, below.

Historical Note (2023 Revision)

(Approved June 28, 2022; Effective January 1, 2023)

(MAI 38.01(A) replaces the prior MAI 31.24 (2005 New).

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

Annotations

1. In general

An adverse employment decision based on sex-based stereotypical attitudes of how a member of the employee's sex should act could support an inference of unlawful sex discrimination. *Lampley v. Missouri Com'n on Human Rights*, 570 S.W.3d 16 (Mo.banc 2019).

Transgender FtM student whose "legal sex" was male alleged facts sufficient to survive motion to dismiss on sex discrimination claim for refusing to let him use male locker room. *R.M.A. by Appleberry v. Blue Springs R-IV School Dist.*, 568 S.W.3d 420 (Mo.banc 2019).

When disjunctive verdict directing instructions were not each supported by substantial evidence, the instructions were prejudicial and warranted reversal. *Kader v. Bd. Of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182 (Mo.banc 2019).

Submission of disjunctive verdict-directing jury instruction, which required jury to return verdict for police officer if city board of police commissioners unjustly refused or delayed officer's disability claim, prejudiced board in officer's action alleging retaliation in violation of Missouri Human Rights Act (MHRA), and thus constituted reversible error; jury found board liable only under the instruction, and although it was clear that jury found in officer's favor on at least one of disjunctive theories submitted to jury, there was no way of discerning which theory the jury chose and thus the Court could not rule out the possibility that the theory was not supported by substantial evidence. *Ross-Paige v. Saint Louis Metropolitan Police Department*, 492 S.W.3d 164 (Mo.banc 2016).

An intimidating work environment, a hostile work environment, an offensive work environment, or an environment that unreasonably interferes with someone's work performance are all actionable forms of discrimination, and by their very nature constitute discrimination that is severe and pervasive, for purposes of a discrimination claim under the Missouri Human Rights Act (MHRA). *McGaughy v. Laclede Gas Co.*, 604 S.W.3d 730 (Mo.App. E.D. 2020).

Amendment to MHRA that changed standard used in assessing claims of employment discrimination applied prospectively. *Bram v. AT&T Mobility Services, LLC*, 564 S.W.3d 787 (Mo.App. W.D. 2018).

MRHA does not protect against harassment based on sexual orientation. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo.App. W.D. 2015).

38.01(B) [2018 Revision] Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing before August 28, 2017)

(No change to Instruction. See Main Volume, p. 920.)

Notes on Use (2014 New)

(Unchanged—See text of Notes on Use, Main Volume, p. 920.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

. . .

B. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides in part:

1. It shall be an unlawful discriminatory practice for an employer, employment agency, labor organization, or place of public accommodation:

. . .

(1) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in

any investigation, proceeding or hearing conducted pursuant to this chapter;

. . .

In *McCrainey v. Kansas City Missouri School Dist.*, 337 S.W.3d 746, 754 (Mo.App. 2011), the Court held that a "plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim." Additionally, the court concluded "that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice." *Id.* at 753. The Committee takes no position on whether "a good faith, reasonable belief" modification to the verdict director is appropriate or required.

C. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo.banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo.

D. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo.banc 2006).

E. This instruction is based on *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo.banc 2012), wherein the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2 to MAI 38.01 (A). Use this instruction only for disability discrimination claims where the issue of disability is disputed. Where plaintiff's disability is not in dispute use MAI 38.01(A).

F. "Disability" is statutorily defined for purposes of the Missouri Human Rights Act in § 213.010(4), RSMo. For a thorough discussion of the definition of "disability" within the context of a Missouri Human Rights Act claim, see *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. 2012), where the court addressed that issue as well as the meaning of "reasonable accommodation." The court also questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

G. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App.

2012), addressed the issue of causation in a Missouri Human Rights Act claim in view of the trial court's attempt to provide the jury with a curative instruction based upon a "but for" argument in closing. In reversing the trial court, the court in *Thomas* stated:

> The trial court's wording of the but for issue—" but for . . . their age . . ., they would not have been terminated" —effectively told the jury that it would not be enough for Appellants to prove that their age was an actual contributing cause of their discharge. Under the law, Appellants could prevail if the jury believed that age was a "contributing factor" in their discharge; this oral instruction said they could prevail only if the jury believed that their age was ***the*** cause, in and of itself, of their discharge. 388 S.W.3d at 216.

The court acknowledged that terms such as "but for causation" are not to be used when instructing the jury as it creates the potential for confusion. It is generally error for a trial court to attempt to instruct the jury on "but for causation." But see, S.B. 43 (2017) and Historical Note, below.

H. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. 2014). But see, S.B. 43 (2017) and Historical Note, below.

Historical Note (2023 Revision)

(Approved June 28, 2022; Effective January 1, 2023)

S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. If such action conflicts with Art V, § 5 and Art I, § 13 of the Missouri Constitution (1945), then see MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. 2014) regarding us-

age of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

38.02 [2018 Revision] Missouri Human Rights Act—Lawful Justification (for actions accruing before August 28, 2017)

(No change to Instruction. See Main Volume, p. 924.)

Notes on Use (2017 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 924.)

Historical Note (2023 Revision)

(Approved June 28, 2022; Effective January 1, 2023)

(MAI 38.02 replaces the prior MAI 31.25 (2005 New).

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

Annotations

1. In general

The lawful reason postulated in the lawful justification defense instruction applicable to employment discrimination claims under the Missouri Human Rights Act (MHRA) must be a non-discriminatory reason. *Kelly v. City of Lee's Summit*, 623 S.W.3d 758 (Mo.App. W.D. 2021).

The lawful justification defense to a claim of employment discrimination under the Missouri Human Rights Act does not appear to fall within the definition of an affirmative defense, since an "affirmative defense" is generally understood to be a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's claim, even if all the allegations in the complaint are true. MAI No. 38.02. *Kelly v. City of Lee's Summit*, 623 S.W.3d 758 (Mo.App. W.D. 2021).

38.03 [2012 Revision] Verdict Directing—Wrongful Discharge in Violation of Public Policy

(No change to Instruction. See Main Volume, p. 926.)

Notes on Use (2011 New)

(Unchanged—See text of Notes on Use, Main Volume, p. 926.)

Committee Comment (2023 Revision)

(Approved June 28, 2022; Effective January 1, 2023)

A. If the case involves constructive discharge, demotion, or adverse job consequences, this instruction can be easily modified. For cases involving such claims, see *Bennartz v. City of Columbia*, 300 S.W.3d 251, 258 (Mo.App. 2009) (the public-policy exception to the at-will employment doctrine may be established with evidence of constructive discharge); *Bell v. Dynamite Foods*, 969 S.W.2d 847, 853 (Mo.App. 1998), abrogated on other grounds by *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81 (Mo. banc. 2010) (constructive discharge is recognized in common law actions for wrongful discharge claims based upon the common law public policy exception to at-will employment).

B. In *Fleshner*, 304 S.W.3d at 92, the employee was discharged for talking to federal investigators about the employer's violation of Fair Labor Standards Act requirements to pay overtime compensation. The Court expressly adopted a public policy exception to the "at will" doctrine where the employee is discharged for reporting violations of law to authorities or for refusing to perform illegal acts. *Id.*

C. The public policy must be found in a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. However, the public policy need only be *reflected* by a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body, and there need not be a direct violation by the employer of that same statute or regulation. Additionally, "there is no requirement that the violation that the employee reports affect the employee personally, nor that the law violated prohibit or penalize retaliation against those reporting its violation." *Id.* at 97. Moreover, the public policy is applicable to communications made to federal or state officials as well as to the employee's supervisors. *Id.* at 97. See also, *Margiotta v. Christian Hospital Northeast-Northwest*, 315 S.W.3d 342 (Mo. banc 2010).

D. In *Fleshner*, the Court also cited the "contributing factor" standard expressed in MAI 31.24 with approval as the standard for causation in this type of wrongful discharge case. *Fleshner*, 304 S.W.3d at

94–95. But see, S.B. 43 (2017) and Historical Note at MAI 38.01(A) and 38.01(B).

E. In *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 103 (Mo. banc 2010), the Court extended the public policy exception to the at-will doctrine to "contract employees" in addition to "at-will" employees.

F. The Court, under the facts in *Keveney*, also determined that in order to survive a motion to dismiss, an employee must plead the following in order to state a cause of action for wrongful discharge under the public policy exception:

(1) That the employee refused to perform an illegal act or act in a manner contrary to public policy;

(2) That the employee was discharged; and

(3) That there is a causal connection between the employee's discharge and the employee's refusal to engage in the actions at issue.

Id. at 103.

G. The *Margiotta* case limited the public policy exception by excluding situations in which the claimed "public policy" is vague or general and not a specific statute, rule, regulation, or constitutional requirement. The Court found that the two regulations cited in *Margiotta* were vague statements and did not specifically proscribe conduct in the alleged incidents. One regulation was extremely broad as to patient safety, and the other regulation clearly dealt with building safety and not patient treatment. For these reasons the Court found that summary judgment was appropriately granted. *Margiotta*, 315 S.W.3d at 347–48.

H. In *Bennartz*, 300 S.W.3d at 261–62, the court held that a municipal employee could not maintain a wrongful discharge cause of action against the defendant municipality under the public policy exception because there was no evidence that the defendant municipality had waived sovereign immunity. See e.g. *Kunzie v. City of Olivette*, 184 S.W.3d 570, 574–75 (Mo. banc 2006) (wherein the Supreme Court of Missouri reversed the trial court's dismissal of a public employee's common law claim of wrongful discharge under the public policy exception because discovery had not yet been conducted as to whether the government entity being sued had waived sovereign immunity pursuant to § 537.610, RSMo).

I. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327

(Mo.App. 2014). But see, S.B. 43 (2017) and Historical Note at MAI 38. 01(A), 38.01(B) and 38.05.

38.06 [2018 New] Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing on or after August 28, 2017)

(No change to Instruction. See Main Volume, p. 933.)

Notes on Use (2018 New)

(Unchanged—See text of Notes on Use, Main Volume, p. 933.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

> 1. It shall be an unlawful employment practice:
>
> (1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:
>
> (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

. . .

B. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides in part:

> 1. It shall be an unlawful discriminatory practice for an employer, employment agency, labor organization, or place of public accommodation:
>
> . . .
>
> (1) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter;
>
> . . .

In *McCrainey v. Kansas City Missouri School Dist.*, 337 S.W.3d 746, 754 (Mo.App. 2011), the Court held that a "plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim." Additionally, the court concluded "that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice." *Id.* at 753. The Committee takes no position on whether "a good faith, reasonable belief" modification to the verdict director is appropriate or required.

C. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo.banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo. The Missouri legislature specifically recognized such a right to trial by jury in § 213.111.3, RSMo.

D. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo.banc 2006).

E. In *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo.banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2. For a disability discrimination claim where the issue of disability is disputed, this instruction must be modified. See e.g., MAI 38.07 and modify accordingly.

F. In *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. 2012), the court questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

Historical Note (2023 Revision)

(Approved June 28, 2022; Effective January 1, 2023)

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03

(verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

38.07 [2018 New] Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing on or after August 28, 2017)

(No change to Instruction. See Main Volume, p. 936.)

Notes on Use (2018 New)

(Unchanged—See text of Notes on Use, Main Volume, p. 936.)

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

. . .

B. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides in part:

1. It shall be an unlawful discriminatory practice for an employer, employment agency, labor organization, or place of public accommodation:

. . .

(1) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in

any investigation, proceeding or hearing conducted pursuant to this chapter;

. . .

In *McCrainey v. Kansas City Missouri School Dist.*, 337 S.W.3d 746, 754 (Mo.App. 2011), the Court held that a "plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim." Additionally, the court concluded "that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice." *Id.* at 753. The Committee takes no position on whether "a good faith, reasonable belief" modification to the verdict director is appropriate or required.

C. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo.banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo.

D. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo.banc 2006).

E. In *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo.banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2 to MAI 38.01(A). Use this instruction only for disability discrimination claims there the issue of disability is disputed. Where plaintiff's disability is not in dispute use MAI 38.06.

F. "Disability" is statutorily defined for purposes of the Missouri Human Rights Act in § 213.010(4), RSMo. For a thorough discussion of the definition of "disability" within the context of a Missouri Human Rights Act claim, see *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. 2012), where the court addressed that issue as well as the meaning of "reasonable accommodation." The court also questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

Historical Note (2023 Revision)

(Approved June 28, 2022; Effective January 1, 2023)

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

38.08 [2018 New] Missouri Human Rights Act—Business Judgment Rule (for actions accruing on or after August 28, 2017)

(No change to Instruction. See Main Volume, p. 940.)

Notes on Use (2018 New)

(Unchanged—See text of Notes on Use, Main Volume, p. 940.)

Committee Comment (2018 New)

(Unchanged—See text of Committee Comment, Main Volume, p. 940.)

Historical Note (2023 Revision)

(Approved June 28, 2022; Effective January 1, 2023)

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

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Annotations

1. In general

General constitutional prohibition on retrospective application of laws did not permit retroactive application of amendment to Missouri Human Rights Act (MHRA), which capped total damages a plaintiff could recover under the MHRA, to former employee's race discrimination and retaliation claims accruing before amendment's effective date, for which jury awarded compensatory and punitive damages; legislature did not express intent that amendment apply retroactively, damages cap statute was not merely procedural or remedial, but, rather, capped compensatory and punitive damages together, and approved jury instructions concerning damages cap only applied to actions accruing on or after amendment's effective date. *McGaughy v. Laclede Gas Co.*, 604 S.W.3d 730 (Mo.App. E.D. 2020).

38.09 [2018 New] Missouri Human Rights Act—Damages (for actions accruing on or after August 28, 2017)

(No change to Instruction. See Main Volume, p. 942.)

Notes on Use (2018 New)

(Unchanged—See text of Notes on Use, Main Volume, p. 942.)

Committee Comment (2018 New)

(Unchanged—See text of Committee Comment, Main Volume, p. 942.)

Historical Note (2023 Revision)

(Approved June 28, 2022; Effective January 1, 2023)

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

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Annotations

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General constitutional prohibition on retrospective application of laws did not permit retroactive application of amendment to Missouri Human Rights Act (MHRA), which capped total damages a plaintiff could recover under the MHRA, to former employee's race discrimination and retaliation claims accruing before amendment's effective date, for which jury awarded compensatory and punitive damages; legislature did not express intent that amendment apply retroactively, damages cap statute was not merely procedural or remedial, but, rather, capped compensatory and punitive damages together, and approved jury instructions concerning damages cap only applied to actions accruing on or after amendment's effective date. *McGaughy v. Laclede Gas Co.*, 604 S.W.3d 730 (Mo.App. E.D. 2020).

38.10 [2018 New] Missouri Human Rights Act—Verdict Form (for actions accruing on or after August 28, 2017)

(No change to Instruction. See Main Volume, p. 944.)

Notes on Use (2018 New)

(Unchanged—See text of Notes on Use, Main Volume, p. 945.)

Committee Comment (2018 New)

(Unchanged—See text of Committee Comment, Main Volume, p. 945.)

Historical Note (2023 Revision)

(Approved June 28, 2022; Effective January 1, 2023)

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

Annotations

1. In general

General constitutional prohibition on retrospective application of laws did not permit retroactive application of amendment to Missouri Human Rights Act (MHRA), which capped total damages a plaintiff could recover under the MHRA, to former employee's race discrimination and retaliation claims accruing before amendment's effective date, for which jury awarded compensatory and punitive damages; legislature did not express intent that amendment apply retroactively, damages cap statute was not merely procedural or remedial, but, rather, capped compensatory and punitive damages together, and approved jury instructions concerning damages cap only applied to actions accruing on or after amendment's effective date. *McGaughy v. Laclede Gas Co.*, 604 S.W.3d 730 (Mo.App. E.D. 2020).

39.00

MERCHANDISING PRACTICES

39.01 Verdict Directing—Violation of Missouri Merchandising Practices Act where S.B. 591 (Laws 2020) does not apply

39.02 Verdict Directing—Violation of Missouri Merchandising Practices Act where S.B. 591 (Laws 2020) applies

39.01 [2022 Revision] Verdict Directing—Violation of Missouri Merchandising Practices Act where S.B. 591 (Laws 2020) does not apply

(Approved November 23, 2021; Effective July 1, 2022)

Your verdict must be for plaintiff if you believe:

First, in connection with the [purchase][sale][1] of (*here identify merchandise afforded protection under the statute*),[2] defendant (*here insert the alleged method, act or practice declared unlawful by § 407.020, RSMo, such as "misrepresented the (merchandise previously identified)" or "concealed a material fact"*),[3] and

Second, plaintiff [purchased] [leased][1] the (*insert merchandise previously identified*) primarily for [personal] [family] [household][4] purposes, and

Third, as a direct result of defendant's conduct, plaintiff sustained damage.

Notes on Use (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

1. Select the appropriate term.

2. Merchandise is defined at § 407.010.4, RSMo, as any "objects, wares, goods, commodities, intangibles, real estate or services."

3. The particular term or phrase incorporated from § 407.020, RSMo, may need to be defined. See discussion in Committee Comment, paragraph F.

4. Select one or more of the appropriate term(s). If more than one term is selected, they should be joined by the word "or".

Committee Comment (2022 Revision)

(Approved November 23, 2021; Effective July 1, 2022)

A. In a private lawsuit for violation of the Missouri Merchandising Practices Act (MMPA), plaintiffs must demonstrate that they (1) purchased merchandise (which includes services) from defendants; (2)

for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the Merchandising Practices Act. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo.banc 2007); *Edmonds v. Hough*, 344 S.W.3d 219 (Mo.App. E.D. 2011). For cases where S.B. 591 (Laws 2020) applies, the person seeking to recover damages shall also establish (a) that the person acted as a reasonable consumer would in light of all circumstances; (b) that the method, act or practice declared unlawful would cause a reasonable person to enter into the transaction that resulted in damages; and (c) individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty. Section 407.025.1, RSMo (2020), see MAI 39.02. The Committee used the phrase "ordinary care," a defined term, to incorporate these reasonableness requirements. See MAI 39.02.

B. The MMPA prohibits "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce" by defining such activity as an unlawful practice. Section 407.020.1, RSMo. Civil actions may be brought under the MMPA to recover actual damages by "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice]." Section 407.025.1, RSMo.

C. The statute does not contain a scienter requirement for civil liability for actual damages. "It is the defendant's conduct, not his intent, which determines whether a violation has occurred." *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo.App. E.D. 1988). Of course, for punitive damages, a different standard applies. See MAI 10.07.

D. Section 407.025 was revised in 2020. For cases in which the prior version of the law applies, a consumer's reliance on an unlawful practice is not required under the MMPA. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 774; 15 CSR §§ 60-9.020, -9.070, -9.110.

E. An MMPA violation occurs regardless of whether the unlawful practice is committed "before, during or after the sale." Section 407.020.1 RSMo.

F. The Supreme Court has cautioned that terms used in the MMPA may have a broader meaning than similar terms used in common law. The Court noted that MMPA regulations define "material fact" as "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision . . ." 15 C.S.R. 60-9.010(1)(C). This definition of "material fact" is broader than the materiality requirement

of common law fraud. See, *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 773.

G. Absence of privity of contract is not a defense in an MMPA action. See, *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo.banc 2007).

H. The "voluntary payment doctrine" was held not to be a defense to an action under the MMPA in *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo.banc 2009).

I. In cases where S.B. 591 (Laws 2020) applies, a person or class action representative seeking to recover damages shall establish "individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty." Section 407.025(2)(c); 407.025(5)(3), RSMo. In a class action, other class members shall establish "individual damages in a manner determined by the court." Section 407.025(5), RSMo.

J. Under the MMPA, the measure of damages is often determined by the "benefit of the bargain" rule. See MAI 4.03; *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883 (Mo.App. E.D. 1994), and *Shiplet v. Copeland*, 450 S.W.3d 433 (Mo.App. W.D. 2014). Missouri Courts have recognized that where the benefit of the bargain rule is inadequate, other measures of damages may be used. See MAI 4.01; *Kerr v. Vatterott Educational Centers, Inc.*, 439 S.W.3d 802 (Mo.App. W.D. 2014) (MAI 4.01 held appropriate where a case involved intangible services and the value of the education was zero). Where plaintiff receives nothing of value, the benefit of the bargain rule does not apply. See *Lollar v. A.O. Smith Harvestore Products, Inc.*, 795 S.W.2d 441, 450–51 (Mo.App. W.D. 1990) (purchaser who received nothing of value, may properly recover the amount paid with interest from the date of payment, plus incidental losses and expenses suffered as a result of the seller's misrepresentations). See also, *Herberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo.banc 1988) ("[t]he benefit of the bargain rule does not apply where the purchaser rescinds and returns the property received or where he received nothing of value.").

K. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

Annotations

1. In general

Jury instruction, which instructed jury to find real estate firm liable if it misrepresented or concealed a material fact about condition of real estate that was known or should have been known by firm, did not misdirect, mislead, or confuse jury as would result in prejudice to firm, in purchaser's action against firm for violations of Missouri Merchandising Practices Act (MMPA); although instruction did not include language that firm would not be liable with respect to seller's disclosure unless it acted with reckless disregard regarding truth or falsity of statements made in disclosure,

finding that firm misrepresented or concealed material fact about condition of real estate via disclosure was same as finding reckless disregard with respect to statements in disclosure. *Soetaert v. Novani Flips, LLC*, 631 S.W.3d 580 (Mo.App. W.D. 2021).

39.02 [2022 New] Verdict Directing—Violation of Missouri Merchandising Practices Act where S.B. 591 (Laws 2020) applies

(Approved November 23, 2021; Effective July 1, 2022)

Your verdict must be for plaintiff if you believe:

First, in connection with the [purchase] [sale][1] of (*here identify merchandise afforded protection under the statute*),[2] defendant (*here insert the alleged method, act or practice declared unlawful by 407.020, RSMo, such as "misrepresented the (merchandise previously identified)" or "concealed a material fact"*),[3] and

Second, such conduct caused plaintiff, in the exercise of ordinary care,[4] to [purchase] [lease][1] (*here identify merchandise afforded protection under the statute*),[2] and

Third, such [purchase] [lease][1] was primarily for [personal] [family] [household][5] purposes, and

Fourth, as a direct result of defendant's conduct, plaintiff sustained damage.

Notes on Use (2022 New)

(Approved November 23, 2021; Effective July 1, 2022)

1. Select the appropriate term.

2. Merchandise is defined at § 407.010.4, RSMo, as any "objects, wares, goods, commodities, intangibles, real estate or services."

3. The particular term or phrase incorporated from § 407.020, RSMo, may need to be defined. See discussion in Committee Comment, paragraph F.

4. The term "ordinary care" must be defined. See MAI 11.05.

5. Select one or more of the appropriate term(s). If more than one term is selected, they should be joined by the word "or".

Committee Comment (2022 New)

(Approved November 23, 2021; Effective July 1, 2022)

A. In a private lawsuit for violation of the Missouri Merchandising Practices Act (MMPA), plaintiffs must demonstrate that they (1) purchased merchandise (which includes services) from defendants; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the Merchandising Practices Act. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo.banc 2007); *Edmonds v. Hough*, 344 S.W.3d 219 (Mo.App. E.D. 2011). For cases where S.B. 591 (Laws 2020) applies, the person seeking to recover damages shall establish (a) that the person acted as a reasonable consumer would in light of all circumstances; (b) that the method, act or practice declared unlawful would cause a reasonable person to enter into the transaction that resulted in damages; and (c) individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty. Section 407.025.1, RSMo (2020). The Committee used the phrase "ordinary care," a defined term, to incorporate these reasonableness requirements.

B. The MMPA prohibits "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce" by defining such activity as an unlawful practice. Section 407.020.1, RSMo. Civil actions may be brought under the MMPA to recover actual damages by "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice]." Section 407.025.1, RSMo.

C. The statute does not contain a scienter requirement for civil liability for actual damages. "It is the defendant's conduct, not his intent, which determines whether a violation has occurred." *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo.App. E.D. 1988). Of course, for punitive damages, a different standard applies. See MAI 10.07.

D. Section 407.025 was revised in 2020. For cases in which the prior version of the law applies, a consumer's reliance on an unlawful practice is not required under the MMPA. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 774; 15 CSR §§ 60-9.020, -9.070, -9.110. For cases in which the new version of the law applies, Section 407.025(2)(b) states "[t]hat the method, act or practice declared unlawful by section 407.020 would cause a reasonable person to enter into the transaction that resulted in damages." See Section 402.025(4), RSMo.

E. An MMPA violation occurs regardless of whether the unlawful practice is committed "before, during or after the sale." Section 407.020.1 RSMo.

F. The Supreme Court has cautioned that terms used in the MMPA may have a broader meaning than similar terms used in common law. The Court noted that MMPA regulations define "material fact" as "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision . . ." 15 C.S.R. 60-9.010(1)(C). This definition of "material fact" is broader than the materiality requirement of common law fraud. See, *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 773.

G. Absence of privity of contract is not a defense in an MMPA action. See, *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo.banc 2007).

H. The "voluntary payment doctrine" was held not to be a defense to an action under the MMPA in *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo.banc 2009).

I. A person or class action representative seeking to recover damages shall establish "individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty." Section 407.025(2)(c); 407.025(5)(3), RSMo. In a class action, other class members shall establish "individual damages in a manner determined by the court." Section 407.025(5), RSMo. Under the MMPA, the measure of damages is often determined by the "benefit of the bargain" rule. See MAI 4.03; *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883 (Mo.App. E.D. 1994), and *Shiplet v. Copeland*, 450 S.W.3d 433 (Mo.App. W.D. 2014).

J. Missouri Courts have recognized that where the benefit of the bargain rule is inadequate, other measures of damages may be used. See MAI 4.01; *Kerr v. Vatterott Educational Centers, Inc.*, 439 S.W.3d 802 (Mo.App. W.D. 2014) (MAI 4.01 held appropriate where a case involved intangible services and the value of the education was zero). Where plaintiff receives nothing of value, the benefit of the bargain rule does not apply. See *Lollar v. A.O. Smith Harvestore Products, Inc.*, 795 S.W.2d 441, 450–51 (Mo.App. W.D. 1990) (purchaser who received nothing of value, may properly recover the amount paid with interest from the date of payment, plus incidental losses and expenses suffered as a result of the seller's misrepresentations). See also, *Herberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo.banc 1988) ("[t]he benefit of the bargain rule does not apply where the purchaser rescinds and returns the property received or where he received nothing of value.").

K. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

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